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DAVID B. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANTS,
v.
CHARLES H. GILDERSLEEVE.
No. 196.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

LOUIS A. FRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

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In the Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,
v.
CHARLES H. GILDERSLEEVE. } No. 198.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF CASE.

Claimant below was clerk of the United States district court for the first district of New Mexico, from January 1, 1897, to March 31, 1898. During that time one James Addison Reavis was tried and convicted of the crime of conspiracy in said court. Said defendant, Reavis, sued out a writ of error from the supreme court of the Territory of New Mexico to said district court, and made affidavit before the clerk of the district court that he was wholly without means to pay for a transcript of the record. The judge of said district court ordered said clerk to prepare said transcript of record, which he did, charging his services therefor to the United States. The accounting officers of the Treasury Department disallowed said charges. Upon suit brought therefor in the Court of Claims

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judgment was rendered against the appellant for the sum of said charges. (Finding II, transcript, pp. 3 and 4.)

Said claimant below also prepared affidavits of poverty for various indigent defendants, filed the same, and filed motions for said defendants, which services he charged to the United States. The accounting officers disallowed said charges. Upon suit brought therefor in the Court of Claims, judgment was rendered against the appellant. (Finding II, transcript, p. 4, item 2.)

Said claimant also issued separate subpœnas for persons selected to serve as grand and petit jurors and attached seals thereto, which services he charged to the United States. The accounting officers disallowed said charges. Upon suit brought therefor in the Court of Claims, judgment was rendered in favor of the claimant. (Finding II, transcript, p. 4, item 3.)

ASSIGNMENT OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the appellant for the charges included in item 1, under Finding II of the findings of fact (transcript, p. 4).

2. In rendering judgment against the appellant for the charges included in item 2, under Finding II of the findings of fact (transcript, p. 4).

3. In rendering judgment against the appellant for the charges included in item 3, under Finding II of the findings of fact (transcript, p. 4).

The services included in item 1, referred to in the first assignment of error, were performed, it is claimed, in pursuance of the order of the court, found on pages 3 and 4 of the transcript. Unquestionably, it became the duty of the clerk to prepare the transcript charged for in accordance with the directions contained in said order of the court, if, indeed, it was not his duty to do so upon præcipe or proper request of the attorney for the defendant; but it is denied that the performance of this duty made the United States liable for the cost and expense of preparing and certifying said transcript of record.

The findings clearly and distinctly show that the the defendant, Reavis, was indigent. Congress, by section 878, Revised Statutes, has expressly declared what fees, costs, and expenses, incurred by indigent defendants, shall be paid by the United States. Said section provides as follows:

> Whenever any person indicted in a court of the United States makes affidavit setting forth that there are witnesses whose evidence is material to his defense; that he can not safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the

> court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. *In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in cases of witnesses subpœnaed in behalf of the United States.* (The italics are ours.)

It seems to us that this section is exclusive upon a familiar principle of statutory construction. The very fact that Congress has seen fit by express enactment to assume these particular expenses of indigent defendants indicates an intention to limit the liability of the Government so as to exclude the allowance or payment of any other costs or expenses incurred by such defendants. Instead of a statute prescribing the fees which are to be paid to the officer or officers performing the service, which is a prerequisite to payment, we have here a statute which virtually proscribes payment of any costs or expenses incurred by indigent defendants other than those named in said section. If the courts have power to determine when the costs incurred by defendants shall be paid by the United States, and to bind the United States to pay the same, by an order merely directing the performance of the service, there would have been no necessity for Congress to legislate upon this subject at all. If costs incurred by *indigent* defendants are to be paid upon order of

the court, then the act of Congress above quoted is entirely superfluous. If Congress had intended that the United States might be charged with the costs incurred by defendants who have been regularly declared indigent under any other circumstances than those named in said section, it certainly would have so declared while legislating upon the subject. In providing that only the costs incurred in procuring witnesses for indigent defendants shall be paid by the United States, Congress has, by the process of exclusion, prohibited the payment by the United States of any and all other costs incurred by said defendants. This construction of the statute may seem to work a hardship sometimes. Indeed, in this very case the appellee evidently performed very considerable services for the defendant for which there was no hope of receiving any compensation from the defendant; but courts can not obligate the United States for fees and costs which the Congress has so manifestly declared should be charged to the defendants alone—to be paid by them, if paid at all.

It does not follow, because the clerk was required by order of the court or otherwise to perform this particular service, that the United States is liable for the fees which the defendant would have to pay if he were not indigent. The United States officers may be, and often are required to perform services for which no compensation has been provided.

> Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. (*United States* v. *Shields*, 153 U. S., 88, 91; *United States* v. *Patterson*, 150 U. S., 65, 69; *United States* v. *King*, 147 U. S., 676, 679; *United States* v. *Van Duzee*, 185 U. S., 278.)

True, the Congress has provided specific fees for such services as were performed by the appellee in preparing and certifying the transcript of record in the case against Reavis. However, it is the unwritten law, and the universal practice in all courts of the United States, that the costs shall be taxed, primarily, against the party causing the service to be performed. Judgments are, of course, sometimes rendered against one or the other party for all the costs, but the clerks of the Federal courts, in taxing the costs in the first instance, uniformly charge them against the party at whose instance the service is performed. When it comes to collecting the costs so taxed, the clerk must look to the party against whom the costs are taxed. If a clerk can not collect the costs taxed against a defendant, it is his misfortune. If the defendant has not been regularly adjudged indigent, he can not look to the United States for any part of them. If he has, he can look to it only for the costs of issuing process, entering and filing returns thereon, and such other costs as are incident to procuring the attendance of witnesses for the indigent defendant.

It has been the uniform and unbroken practice of the Treasury Department for many years to disallow all charges for defendant's costs other than those enumerated in section 878. (2 Dec. Compt., 220, 221, 224, 578, and 612.)

It was claimed below, in behalf of the appellee, that this court had decided that proceedings in criminal cases are at the expense of the Govern ment. The case of *United States* v. *Van Duzee* (140 U. S., 169, 173), wherein the court said—

> We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished at the request of the defendant and at the expense of the Government, and when such order is made the clerk is entitled to his fee for the copy.

was presented as authority for said claim. An examination, however, of this case shows that the service which the court had under consideration then was not one to be performed merely for an indigent defendant, but one which the court might by order require to be performed as a matter of right to any and every person under indictment. The court could not have had in mind the matter of costs and expenses incurred by indigent defendants in rendering said decision.

The services included in item 2, referred to in the second assignment of error, were performed for indigent defendants, as the charges plainly show. They are open to the same objection urged to the charges included under item 1. Section 878

provides for the payment of the "costs incurred by the process and the fees of the witnesses" in the cases of indigent defendants. According to the plain reading of this statute, the Government's liability for the costs does not begin until the court has ordered process to be issued for defendant's witnesses under said section. This would, of course, exclude charges for preparing and filing affidavits of poverty, as well as any motions not having direct relation to the issuance of process. If the United States is liable at all for the charge for preparing and filing the affidavit, it is liable in cases where the application is refused, as well as in cases where it is granted, for it is perfectly plain that the affidavit should be filed in all cases, whether the judge orders the witness to be subpœnaed thereunder or not. It will hardly be contended that the United States should pay for these affidavits or for filing the same, in cases where the defendant's application for process is not granted by the court. (*Dundy case*, 76 Fed. Rep., 357.)

It does not appear clearly in the findings what was the nature of the motions filed in behalf of the defendants, as charged in this item, but it seems clear that there could properly be no motion made by the defendant falling within the class of fees agreed to be paid for by the United States under the provisions of said section 878.

The services charged for under item 3, referred to in the third assignment of error, are objected to because the findings of fact do not show that there

was a rule of court or that it was the practice in the Territory of New Mexico to serve persons selected as grand and petit jurors with a formal summons or subpœna. The clerk is inhibited by section 828, Revised Statutes, from making any charges for issuing the original writ of venire. In some jurisdictions the practice prevails, or a rule of court requires, that a summons consisting of a copy of the original writ be mailed to each person selected to serve as a juror. In some other jurisdictions it is the practice to have an officer serve the person so selected with a copy of the venire.

In the case of Martin, a clerk in the western district of Virginia (No. 20894, C. Cls. R.), the clerk was allowed a fee of 25 cents for each copy of venire to be served upon the persons selected as jurors, as for a summons. This charge was virtually conceded by the United States in that case on account of a rule of court. Seals to said copies, however, were disallowed in said case, as also in the case of *Martin* v. *United States* (23 C. Cls. R., 160).

In the case at bar, as has been before stated, there was no rule of court, and no fixed practice is shown to have existed upon the subject. The allowance, therefore, of any charges whatever for this service, it would seem, is without authority of law. Certainly, no allowance should be made for seals to said subpœnas. Seals are only allowed

for when required by the accounting officers, or by rule of the court. See *United States* v. *Van Duzee* (140 U. S., 169); *United States* v. *Jones* (147 U. S., 672); *United States* v. *Taylor* (147 U. S., 695); *Singleton* v. *United States* (22 C. Cls. R., 118); *Martin* v. *United States* (23 C. Cls. R., 160).

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